88-1611

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

DANIEL SCOTT GAHAGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a search warrant which fails to describe the premises to be searched with sufficient particularity can be cured by an affidavit which is neither attached to nor incorporated by the warrant?

LIST OF PARTIES

Petitioner Daniel Scott Gahagan and Respondent United States of America were parties to the proceedings in the Sixth Circuit Court of Appeals. Petitioner's appeal in the Sixth Circuit was consolidated with the appeals of Co-Defendants in the District Court, Michael John Gahagan and Susan Soper.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF CASES AND AUTHORITIES iv

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

A SEARCH WARRANT WHICH FAILS TO DESCRIBE THE PLACE TO BE SEARCHED WITH SUFFICIENT PARTICULARITY CANNOT BE CURED BY RELIANCE ON AN AFFIDAVIT WHICH IS NEITHER ATTACHED TO NOR INCORPORATED BY THE WARRANT 8

CONCLUSION 16

APPENDIX 1a

TABLE OF CASES AND AUTHORITIES

Page

CASES:

Anderson v. Maryland, 427 U.S. 463, 480, 96 S.Ct. 2737, 2748, 49 L.Ed.2d 627 (1976) 8

Application of Lafayette Academy, Inc., 610 F.2d 1 (1st Cir. 1979) 11

Marron v. United States, 275 U.S. 192, 195-196, 48 S.Ct. 74, 75-76, 72 L.Ed 231 (1927) 8

Steele v. United States, 267 U.S. 498, 503, 45 S.Ct. 414, 416, 69 L.Ed. 757 (1925) 9

United States v. Collins, 830 F.2d 145, 146 (9th Cir. 1987) 9, 16

United States v. Hayes, 794 F.2d 1348, 1354 (9th Cir. 1986) *cert. denied*, ___ U.S. ___, 107 S.Ct. 1289, 94 L.Ed.2d 146 (1987) 11

United States v. Klein, 565 F.2d 183, 186 n.3 (1st Cir. 1977) 11

United States v. Leary, 846 F.2d 592, 603 (10th Cir. 1988) 10, 12

United States v. Leon, 468 U.S. 897 (1984) 7

United States v. Medlin, 798 F.2d 407, 410 n.1 (10th Cir. 1986) 11

United States v. Strand, 761 F.2d 449, 453 (8th Cir. 1985) 10, 11

United States v. Votteller, 544 F.2d 1355, 1362 (6th Cir. 1976) 9

United States v. Wuagneux, 683 F.2d 1343, 1351, n.6 (11th Cir. 1982), *cert. denied*, 464 U.S. 814, 104 S.Ct. 69, 78 L.Ed.2d 83 (1983) 12

TABLE OF AUTHORITIES–Continued

Page

UNITED STATES CODE:

28 U.S.C. §1254(1) 2

FEDERAL RULES:

Fed.R.Crim.P. 11(a)(2) 3

UNITED STATES CONSTITUTION:

Fourth Amendment 2

OTHER:

2 W. LaFave, *Search and Seizure*, §4.6(a) at 241 10

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DANIEL SCOTT GAHAGAN,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

THE PETITIONER, Daniel Scott Gahagan, by and through his attorneys, Haddon, Morgan & Foreman, P.C., respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit, entered in the above-captioned action on January 25, 1989.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 865 F.2d 1490, and is reprinted in the Appendix hereto, p. 1a, *infra*.

JURISDICTION

Petitioner entered a conditional guilty plea in the United States District Court for the Eastern District of Michigan. On January 25, 1989, the Sixth Circuit Court of Appeals issued its opinion affirming the decision of the trial court denying Petitioner's Motion to Suppress Evidence. Petitioner's timely filed Petition for Rehearing was denied on March 3, 1989, see p. 12a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On August 4, 1987, Petitioner Daniel Gahagan entered a plea of guilty to the charge of possession of hashish with intent to distribute. The plea was entered pursuant to Fed.R.Crim.P. 11(a)(2) with Petitioner reserving his right to appeal. J.A. at 94-98, 103.[1] The District Court had suggested the possibility of the conditional plea after denying Petitioner's Motion to Suppress Evidence, but in doing so, acknowledging the closeness of the issues. J.A. at 386-87.[2] The main issue presented on appeal to the Sixth Circuit was the suppression issue which the appellate court characterized as raising "complicated search and seizure issues." 865 F.2d at 1491, p. 2a, *infra*.[3]

The search at issue in this case was conducted pursuant to a warrant which described the premises to be searched only by address: 7609 Douglas Lake Road, Johannesburg, Michigan. J.A. at 64. Two affidavits were used to obtain the warrant which was issued by a state court judge. The first affidavit was on a printed form and further described the premises to be searched as follows:

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[1] J.A. stands for Joint Appendix which was filed in the Sixth Circuit pursuant to Local Rule 11.

[2] Also charged in the District Court were Co-Defendants Michael Gahagan and Susan Soper. All three Defendants joined in the Motion to Suppress Evidence, all three entered conditional pleas and their appeals were consolidated in the Sixth Circuit.

[3] Petitioner also appealed the denial of one of his motions *in limine* but does not seek certiorari on that issue.

> 7609 Douglas Lake Road, Charleton Township, Otsego County, Johannesburg, Michigan, three story wood frame house with natural wood siding with an unattached four-car garage with natural color siding. Also located on the property is a single story wood frame log cabin-type structure painted dark brown in color. Also located on the property is a small wood frame shed-type building with a metal roof.

J.A. at 65. The first affidavit incorporated an attached second affidavit which was a multi-page document which set forth the facts the officers believed established probable cause. J.A. at 66-72. Neither of the affidavits, however, was attached to or incorporated by the warrant.

Both affidavits were prepared by DEA Agent Michael Vetter based upon information provided by an investigator from a local prosecutor's office, Jerry Boerema. Vetter had not participated in the investigation of Petitioner, nor had he read any reports or listened to any of the available tapes of debriefing sessions with the confidential informant. J.A. at 127. None of the officers executing the warrant, including Vetter or Boerema, had ever seen the dwellings searched prior to the search. J.A. at 122-24.

Vetter led the search party which arrived at 7609 Douglas Lake Road, referred to as "House B,"[4] at approximately 7:00 p.m. on September 12, 1986. No one was at House B so a group of officers walked through the woods to Cabin 3 where Petitioner and the two Co-Defendants were present. J.A. at 132-33. All three were placed in custody.

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[4] The numbers and letters used to identify the dwellings are those used by the parties at the evidentiary hearing and by the Court of Appeals in its opinion.

Although the warrant authorized only the search of 7609 Douglas Lake Road, House B, the officers also searched a separate dwelling, 7577 Douglas Lake Road, referred to as "Cabin 3." The search did not end until 3:00 p.m. the next day. Marijuana and hashish were found in Cabin 3. See J.A. at 73-85.

The search of the dwelling not encompassed by the warrant resulted from the officers' confusion about the location and description of four houses located in close proximity to each other in this wooded rural Michigan site. In addition, Vetter incorrectly used the address for House B, 7609 Douglas Lake Road, to refer to three different dwellings at different times in the second affidavit.

The location searched is perhaps best understood by reference to the diagram depicted in Appendix 1 to the Court of Appeals' opinion. See p. 24a, *infra*. House B was a multi-story wood frame house in a partially completed state with an unattached multi-car garage. J.A. at 115, 302. Access to House B was gained by Driveway 1 at the entrance of which was displayed the street address, 7609. J.A. at 110. While Petitioner was co-owner of House B, at the time of the search it was the principal residence of Co-Defendants Michael Gahagan and Susan Soper. J.A. at 187.

Cabin 3 was a single story brown wood frame house which was the principle residence of Petitioner at the time of the search. J.A. at 284. A recently constructed Driveway 3 serviced Cabin 3 at the time of the search. J.A. at 301. Prior to its construction, access to Cabin 3 was gained by Driveway 2, which also served House 4. At the

time of the search, the address for Cabin 3, 7577, was still posted at the entrance of Driveway 2.[5] J.A. at 301.

House 4, a multi-story wood frame house with a two-car unattached garage, previously had been owned by the Gahagan family. J.A. at 108. The first three controlled buys by the confidential informant took place in House 4, although it was erroneously identified in the second affidavit with House B's address, 7609.

Cabin 2 was a single story brown wood frame house located about one hundred yards north of House 4. J.A. at 106. It was so similar in appearance to Cabin 3 that Vetter initially identified a photograph of Cabin 2 as being Cabin 3. J.A. at 128-29.

None of the executing officers had even been on the Gahagan property or viewed the four dwellings. Further complicating matters was the fact that Vetter, who prepared the affidavits in support of the warrant, erroneously claimed that there was only one "main dwelling" and one "cabin" on the property. Thus, the address for House B was incorrectly used in the second affidavit to refer to different dwellings at different times. For example, in paragraph 7 of the second affidavit, it was claimed that Boerema advised Vetter that three controlled buys of marijuana were made by the confidential informant in early 1986 at 7609 Douglas Lake Road. Boerema admitted that these alleged buys did *not* take place in House B, but rather House 4. (J.A. at 266) Boerema admitted that the

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[5] House 4 had been recently sold and part of the agreement with the buyer was that Driveway 2 would no longer be used for Cabin 3; hence, the construction of Driveway 3.

affidavit thus used 7609 Douglas Lake Road to describe two distinct houses. (J.A. at 267) With regard to paragraphs 9 and 10, Boerema admitted that the references to 7609 Douglas Lake Road "probably" referred to "the whole property" and included Houses B and 4, Cabin 3, the nearby shed and garage. (J.A. at 268-69) In addition, Boerema was unable to tell the Court whether the references to "main dwelling" in paragraphs 12 and 18 meant House 4 or House B since it could mean either. (J.A. 269-72) The trial judge aptly summarized this confusion stating, "it boggles the mind how a judge who reads this could understand this." (J.A. at 267)

The trial court ruled from the bench and denied Petitioner's Motion to Suppress Evidence. Although the trial judge acknowledged that the warrant did not authorize the search of Cabin 3, he concluded that the officers were directed to Cabin 3 by the first and second affidavits, despite the confusion inherent in those affidavits. J.A. at 370. Ultimately, however, the trial court denied the motion to suppress based on *United States v. Leon*, 468 U.S. 897 (1984), and concluded that the searching officers had acted in good faith. J.A. at 373-74. See 865 F.2d at 1485, p. 12a, *infra*.

On appeal to the Sixth Circuit, Petitioner articulated the three suppression issues as follows:

> (1) whether the trial court erred in denying defendant's motion to suppress evidence on the basis that the warrant failed to describe the properties to be searched with sufficient particularity under the fourth amendment; (2) assuming the validity of the warrant, whether the execution of the warrant

> exceeded its scope in violation of the fourth amendment; (3) whether the *Leon* good-faith exception to the warrant requirement is applicable to this case . . .
>
> 865 F.2d at 1495, p. 13a, *infra*.

The Court of Appeals affirmed the trial court's denial of the Motion to Suppress but on different grounds. The appellate court concluded that the particularity deficiencies in the warrant were cured by reliance on the description of the premises to be searched given in the unattached and unincorporated affidavits. 865 F.2d at 1496-99, pp. 14a-21a, *infra*. Having held that the warrant, as cured by the affidavits, authorized the search of Cabin 3, the appellate court found it unnecessary to address the question of whether the execution of the warrant exceeded its scope or whether the good faith exception of *Leon* was applicable to the case. 865 F.2d at 1496-99, p. 21a, *infra*.

REASONS FOR GRANTING THE WRIT

A SEARCH WARRANT WHICH FAILS TO DESCRIBE THE PLACE TO BE SEARCHED WITH SUFFICIENT PARTICULARITY CANNOT BE CURED BY RELIANCE ON AN AFFIDAVIT WHICH IS NEITHER ATTACHED TO NOR INCORPORATED BY THE WARRANT.

One of the specific and categorical prohibitions of the Warrant Clause of the Fourth Amendment is that no warrant shall issue except those "particularly describing the place to be searched." The Framer's clear intent was to prohibit the general, exploratory search so common in colonial days. *Anderson v. Maryland*, 427 U.S. 463, 480, 96 S.Ct. 2737, 2748, 49 L.Ed.2d 627 (1976), and *Marron v.*

United States, 275 U.S. 192, 195-196, 48 S.Ct. 74, 75-76, 72 L.Ed 231 (1927). Thus, authority to search is strictly limited to the specific places and things described in the warrant and for which there is probable cause to search. The particularity requirement not only ensures that officers will search the location intended by the issuing magistrate, but also helps guarantee that the magistrate can competently make a probable cause determination.

The test for determining whether the description in the warrant is sufficient to satisfy the particularity requirement is whether "the description is such that the officers with a search warrant can with reasonable effort ascertain and identify the place intended." *Steele v. United States*, 267 U.S. 498, 503, 45 S.Ct. 414, 416, 69 L.Ed. 757 (1925), and *United States v. Votteller*, 544 F.2d 1355, 1362 (6th Cir. 1976). The validity of the warrant is called into question if there is a reasonable possibility that another premise might be mistakenly searched. *United States v. Collins*, 830 F.2d 145, 146 (9th Cir. 1987).

The Court of Appeals correctly concluded that "the warrant itself did not contain a sufficient description of Cabin 3, 7577 Douglas Lake Road. The description in the warrant identified only the address of 7609 Douglas Lake Road, while in fact Cabin 3 was not part of that address." 865 F.2d at 1497, p. 16a, *infra*.[6] However, the Court of

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[6] The Court of Appeals earlier concluded that use of the address alone in the warrant justified the search of House B, the dwelling with the address listed in the warrant. 865 F.2d at 1496, p. 14a, *infra*. In reaching that conclusion, the Court of Appeals ignored the confusion created by the use of that address in the affidavits to refer to different dwellings at different times.

Appeals erroneously held that the warrant's particularity defect could be cured by reliance on Vetter's affidavits.

There are two requirements which must be satisfied before an affidavit can be used to cure a lack of particularity in a warrant. "First, the affidavit and search warrant must be physically connected so that they constitute one document; and second, the search warrant must expressly refer to the affidavit and incorporate it by reference using suitable words of reference." 2 W. LaFave, *Search and Seizure*, §4.6(a) at 241, quoted in *United States v. Leary*, 846 F.2d 592, 603 (10th Cir. 1988). The Sixth Circuit conceded that the undisputed facts revealed that neither of these requirements were met in this case. "We recognize that it was established at the evidentiary hearing that the affidavit itself was not attached to the warrant. . . . It was not disputed that the warrant itself did not specifically incorporate the affidavit."[7] 865 F.2d at 1497, p. 17a, *infra*.

Despite these undisputed facts, the Sixth Circuit held that the affidavits could be used to cure the particularity defect in the warrant. In so holding, the Court established

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[7] The Sixth Circuit did note, without explanation, that the "trial judge found that the warrant cross-referenced the affidavit." 865 F.2d at 1497, p. 17a, *infra*. It is unclear what is meant by "cross-referenced." The warrant was on a printed form which stated that "grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s)." J.A. at 64. This identical language was held to be insufficient to constitute incorporation of an affidavit which, unlike here, accompanied the warrant. *United States v. Strand*, 761 P.2d 449, 453 (8th Cir. 1985).

a new standard which allows an unattached, unincorporated affidavit to cure a deficient warrant if the affidavit *could have* been used to aid the executing officers. This new standard further accentuates a conflict which already exists among the Circuits.

As the Tenth Circuit acknowledged in *Leary*, 846 F.2d at 603, that Circuit requires both attachment and incorporation before an affidavit can be used to cure a defective warrant. *See United States v. Medlin*, 798 F.2d 407, 410, n.1 (10th Cir. 1986) ("when an affidavit is attached to a warrant and incorporated by reference into a warrant, it can be used to cure a lack of particularity.") Both the Ninth and Eighth Circuits are in agreement with this two-prong requirement. *United States v. Hayes*, 794 F.2d 1348, 1354 (9th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 1289, 94 L.Ed.2d 146 (1987) (although it was disputed whether the warrants adequately incorporated the affidavits by reference, the affidavits were not attached and therefore could not be considered in determining whether the warrant was facially overbroad), and *United States v. Strand*, 761 F.2d 449, 453 (8th Cir. 1985) (affidavit could not be considered even though it accompanied warrant since warrant did not incorporate affidavit by reference). *See also, Application of Lafayette Academy, Inc.*, 610 F.2d 1 (1st Cir. 1979) (even if specificity appears in affidavit, affidavit not served with warrant and warrant does not incorporate affidavit), and *United States v. Klein*, 565 F.2d 183, 186 n.3 (1st Cir. 1977) ("an affidavit may be referred to for purposes of providing particularity if the affidavit accompanies the warrant, *and* the warrant uses suitable words of reference which incorporate the affidavit").

In contrast, the Eleventh Circuit recognizes what the Tenth Circuit characterized in *Leary*, 846 F.2d at 603, n.20, as the "more relaxed rule." In *United States v. Wuagneux*, 683 F.2d 1343, 1351, n. 6 (11th Cir. 1982), *cert. denied*, 464 U.S. 814, 104 S.Ct. 69, 78 L.Ed. 2d 83 (1983), the Court used an affidavit to cure a particularity defect as to one category of documents to be seized because the affiant had explained the contents of the affidavit to the searching officers and had given them the opportunity to read the affidavit. In addition, both the affiant and the affidavit were present at the search.

If the Eleventh Circuit's rule is accurately characterized as relaxed, then the rule announced in this case by the Sixth Circuit is fairly described as flimsy. The Sixth Circuit cured the defective warrant by reference to the unattached, unincorporated affidavit because it *could have* aided the officers. Yet the undisputed facts show that the affidavit was *not* used to aid the officers.

The following facts were undisputed. None of the executing officers had ever been on the property to be searched, including Vetter, who prepared the affidavit and led the search. (J.A. at 122-124) None of the executing officers had copies of the warrant for purposes of giving them to the Defendants. (J.A. at 136-137) There were *no* copies of the unattached, unincorporated affidavit available for use by the executing officers. (J.A. at 136-137) Vetter possessed the only affidavit, and no other executing officers ever read the affidavit nor was it read to

them. (J.A. at 168-169)[8] Amazingly, the state officer who conducted the initial investigation, Boerema, did not read the completed affidavit. J.A. at 203.

Not only was it not disputed that the affidavits were never used to aid the officers in limiting the scope of their search, but had they consulted the affidavits they would have found only further confusion.

The first affidavit, which purports to offer an expanded description of 7609 Douglas Lake Road, see p. 5a, *infra,* was in fact a mixture of descriptions of House B and House 4. Both House B and House 4 are multi-story wood frame houses with unattached multi-car garages, but neither has a cabin on its "property." The description of a "single story wood frame log cabin-type structure painted dark brown in color" matches both Cabin 2 and Cabin 3. (J.A. at 128) Indeed, Vetter initially identified a photo of Cabin 2 (J.A. at 106) as Cabin 3 (J.A. at 107 and 127). Cabin 3 is visible from House 4, but not from House B. (J.A. at 237) Also, near to and visible from House 4 is a small wood frame shed with a metal roof. House B has no such shed. (J.A. at 303)

Thus, the expanded description in the first affidavit, while using the address for House B, more closely depicts House 4. This hybrid, confusing description is a result of a lack of investigation and the use of the address of 7609

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[8] The *only* affidavit was in Vetter's briefcase, in his vehicle. (J.A. at 351) While the Court of Appeals assumed that Vetter used that same vehicle in the search, the record is at best unclear on this point, given the fact that Vetter was unaware of the kind of vehicle he was in that day – "I believe it's a Bronco, yes." (J.A. at 132)

Douglas Lake Road to refer at different times to different dwellings or combinations thereof as previously detailed in the Statement of the Case.

The Court of Appeals' new standard, which allows a concededly deficient warrant to be cured by an unattached, unincorporated affidavit which itself suffers from particularity defects, is in practice no standard at all. All that is required is for an officer to say, *after the search,* that he intended to search the property he searched despite what was authorized in the warrant. It is a "standard" which allows the results of the search to cure the constitutional defects in the warrant. In this case, the officers happened to find what they were looking for in Cabin 3. Had they not, there is little question they would have searched the other structures in the area. Had they also searched House 4 and Cabin 2, the fruits of those searches would also be upheld under the analysis of the Court of Appeals. The only limitation on officers remaining under this standard is self restraint.

Finally, the Court of Appeals held that "relevant information" known by the executing officers "can be relied upon to validate a warrant if the description contained in the warrant itself is less than complete." 865 F.2d at 1498, p. 20a, *infra*. Yet in the cases cited by the Sixth Circuit, 865 F.2d at 1497-98, pp. 18a-19a, *infra*, the affiant had personal knowledge of the premises to be searched, was present on the scene, became aware of the error in addresses, and was able to have the officers take corrective action. Here, in contrast, it is not disputed that

none of the executing officers had any personal knowledge of the premises to be searched.[9]

In this case, the officers had no relevant information which impacted on the likelihood of searching the wrong premises. Indeed, as has been shown, the acknowledged inadequate description in the warrant, the confusion over which structures were included in the address of 7609, the hybrid and confusing description in the affidavit, and the lack of personal knowledge on the part of the executing officers all combined to create the probability that the

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[9] There is no question that more information was readily available to make the warrant more particular and to further educate the searching officers about the layout of properties and dwellings they searched. The affiant, Vetter, knew nothing about the background of the investigation which, at the time of the search, was nine months old. Despite this lack of knowledge, Vetter failed to review any reports or listen to any tapes which contained debriefing sessions with the confidential informant. J.A. at 127-28. Boerema, who was familiar with the investigation, made the confidential informant available to Vetter, but his participation in the drafting of the affidavit was sporadic and marginal at best. In the end, Boerema did not even bother to read the completed affidavit. J.A. at 203.

After "misunderstanding" much of the information he obtained from his one conversation with the informant, Vetter prepared the affidavit and then did absolutely nothing to confirm any of the information. Neither officer ever viewed the property or dwellings in question. No investigation was undertaken to determine the boundaries of the Gahagan property, or the number, location and address of the dwellings on the property. J.A. at 130, 151. Vetter did not contact the register of deeds to determine the configuration and ownership of the various lots in question. Nor did the officer contact the county treasurer to determine who was paying taxes on the properties. Neither the phone company nor any of the servicing utilities were contacted. J.A. at 140-42.

officers would have searched *all* houses had they not, by chance, searched Cabin 3 first. See *United States v. Collins*, 830 F.2d 145 (9th Cir. 1987). It is precisely this type of general search the particularity requirement was designed to prevent.

CONCLUSION

This Court has never articulated the requirements that must be satisfied for an affidavit to be used to cure a warrant which is not sufficiently particular. As demonstrated by the Tenth Circuit's decision in *Leary*, the dual requirements of attachment and incorporation fulfill the purposes of the particularity requirement. In stark contrast is the Sixth Circuit's decision in this case which leaves enforcement of the particularity requirement up to the self-restraint of law enforcement.

DATED this 31st day of March, 1989.

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APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Daniel Scott GAHAGAN (87-1991), Michael John Gahagan (87-1993), Susan Soper (87-1992),
Defendants-Appellants.

Nos. 87-1991 to 87-1993.

United States Court of Appeals,
Sixth Circuit.

Argued and Submitted Aug. 5, 1988.
Decided Jan. 25, 1989.

Two defendants pleaded guilty in the United States District Court for the Eastern District of Michigan, James P. Churchill, J., to possessing with intent to distribute approximately 311 grams of hashish. A third defendant pleaded guilty to conspiracy to possess marijuana. Defendants appealed. The Court of Appeals, Dowd, District Judge, sitting by designation, held that search of cabin was proper, although search warrant did not include address of that cabin.

Affirmed.

Norman R. Mueller, Saskia A. Jordan (argued), Denver, Colo., for Daniel Scott Gahagan.

Janet Parker (argued), Asst. U.S. Atty., Bay City, Mich., for plaintiff-appellee.

Jeffrey W. Van Treese, Hoffman, Hoffman & Van Treese, Charlevoix, Mich., for Susan Soper.

Gregory G. Justis, Petoskey, Mich., for Michael John Gahagan.

Before ENGEL, Chief Circuit Judge, MILBURN, Circuit Judge and DOWD, District Judge.*

DOWD, District Judge.

I. INTRODUCTION.

Defendants-appellants Daniel Gahagan and Michael Gahagan appeal from the judgment of the district court entered pursuant to Rule 11(a)(2) plea agreements with the government wherein the Gahagans pleaded guilty to the charge of possessing with intent to distribute approximately 311 grams of hashish. Defendant-appellant Susan Soper appeals from the judgment of the district court entered pursuant to a Rule 11(a)(2) plea of guilty to a superseding information in which she was charged with conspiracy to possess marijuana. Simply stated, this appeal raises complicated search and seizure issues. Specifically, the two primary issues are whether the search warrant complied with the particularity requirement of the fourth amendment, and in the alternative, whether the scope of the warrant was exceeded in its execution.

II. PROCEDURAL BACKGROUND.

On May 21, 1987 an indictment was returned against Daniel Gahagan, his brother Michael Gahagan, and Susan Soper. A superseding indictment against the same three individuals was retuned on July 29, 1987. The three were charged with conspiracy to possess with the intent to

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*Honorable David D. Dowd, Jr., Judge, United States District Court for the Northern District of Ohio, sitting by designation.

distribute and to distribute marijuana and hashish in count one of the indictment. Daniel Gahagan and Michael Gahagan were also charged in count five with distributing approximately 141 grams of hashish, in count six with possession with the intent to distribute approximately 840 grams of marijuana, and in count seven with possession with the intent to distribute approximately 311 grams of hashish. Michael Gahagan, in addition to being charged in the conspiracy charge in count one, and counts five, six and seven, was charged in count two with distributing approximately 108 grams of marijuana, and count three with distributing approximately eighty-five grams of marijuana, and count three with distributing approximately eighty-five grams of marijuana, and count four with distributing approximately 110 grams of marijuana.

The Gahagans filed a motion to suppress the evidence and a motion in limine on June 25, 1987. A second motion in limine was also filed on July 13, 1987. The appellant Soper joined in the motions and also filed a motion to sever. The district court heard testimony and oral arguments on the motions on July 29 and July 30, 1987. The district court denied the motion to suppress the evidence and granted in part and denied in part the motions in limine. After denying the motion to suppress, the district court acknowledged the closeness of the issues and suggested the possibility of a conditional plea. Joint Appendix ("J.A.") at 386-87.

Subsequent to the court's rulings, the three defendants entered guilty pleas while reserving their rights for appeal pursuant to Rule 11(a)(2), Fed.R.Cr.P.J.A. at 89-98, 103. The Gahagans pled guilty to count seven of the

indictment and each was sentenced to a two-year term of imprisonment, followed by a two-year special parole term. Susan Soper entered a plea of guilty to a superseding information and was sentenced to a sixty-day term of imprisonment. A timely notice of appeal was filed on behalf of the three defendants.

III. THE SEARCH.

Prior to the search in September of 1986, the defendants were under an investigation initiated by Jerry Boerema, an investigator for Otsego County Prosecutor's Office, for a period of approximately nine months. During that period, an informant allegedly made three separate purchases of illegal narcotics under Boerema's supervision ("controlled buys") at a Gahagan residence in January, February, and March of 1986. In September of 1986 and shortly before the search of the Gahagan residence, Boerema contacted the Drug Enforcement and Administration ("DEA") office in Saginaw, Michigan and requested assistance from the DEA. Michael Vetter, a DEA agent, was assigned to the case.

On September 12, 1986, the same informant who had made the three previous control buys made a fourth controlled buy from the Gahagans. Thereafter, Agent Vetter sought a federal search warrant from Judge William Porter, a circuit court judge in the State of Michigan. Judge Porter issued the warrant based upon the affidavit of Michael Vetter, which was based upon Jerry Boerema's nine month investigation.

The warrant itself listed the premises to be searched as "7609 Douglas Lake Road, Johannesburg, Michigan."

J.A. at 64. Vetter's affidavit described the premises for which the warrant was sought as

> 7609 Douglas Lake Road, Charleton Township, Otsego County, Johannesburg, Michigan, three story wood frame house with natural wood siding with an unattached four-car garage with natural color siding. Also located on the property is a single story wood frame log cabin-type structure painted dark brown in color. Also located on the property is a small wood frame shed-type building with a metal roof.

J.A. at 65. Vetter's affidavit incorporated a second affidavit, a multipage document, which set out in detail the investigation, the controlled buys, and facts upon which the officers believed established probable cause.[1]

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[1] Vetter used a printed affidavit form calling for a recitation of the grounds for the search and seizure and the facts that established the grounds for the issuance of the search warrant. That recitation was accomplished by the attached and incorporated second affidavit which was seven pages in length and contained thirty-six separate paragraphs of information. The affidavit established that a confidential informant had purchased controlled substances, marijuana and its derivatives, from the Gahagans over a six-year period and that three controlled purchases of marijuana were made at the property known as 7609 Douglas Lake Road on January 29, 1986, February 12, 1986 and March 20, 1986. ¶7, J.A. at 66-67. The affidavit also established that Officer Boerema advised Vetter that the confidential informant had been informed by the Gahagans that narcotics were kept in different locations upon and about the property located at 7609 Douglas Lake Road. ¶9, J.A. at 67. The affidavit also established that when controlled substances were purchased from the Gahagans, they would often take place in a one-story wood frame cabin and the Gahagans would obtain the marijuana from other locations on the property. The information in the affidavit also established that the

(Continued on following page)

The search warrant was executed on that same day, i.e., September 12, 1986. Vetter conducted a pre search briefing session for those officers who participated in the search and provided them a description of the premises to be searched. J.A. at 160-62, Tr. at 70-72. Boerema also assisted Vetter in the pre search briefing session and

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(Continued from previous page)

Gahagans engaged in a detailed accounting of the purchases made on a cash basis and a credit basis and recorded such transactions in a separate ledger. Joint Appendix 67-68.

The affidavit also set out the factual details regarding the controlled buy on September 12, 1986, the day of the search. ¶¶30-36, J.A. at 70-72. The affidavit established that the affiant, Vetter, was in contact with the confidential informant before and after the controlled buy. Officer Vetter searched the confidential informant and his vehicle for controlled substances prior to the controlled buy. Officer Vetter then gave the informant government funds that were pre-marked with instructions to drive his vehicle to 7609 Douglas Lake Road and purchase marijuana from the Gahagans. Officer Vetter kept the confidential informant under direct surveillance and observed the informant drive into and enter the property known as 7609 Douglas Lake Road. Officer Vetter and other law enforcement officials observed the confidential informant exit the property of 7609 Douglas Lake Road and was kept under surveillance until a predetermined meeting place was reached by the confidential informant. After receipt of the marijuana purchased by the confidential informant, another search of the confidential informant was conducted including the search of his vehicle.

The confidential informant advised Officer Vetter that he did in fact drive to 7609 Douglas Lake Road, as directed, and exited his motor vehicle near the front door of the main dwelling at 7609 Douglas Lake Road. The confidential informant advised Officer Vetter that he entered the small cabin with Michael John Gahagan and thereafter purchased marijuana from both the Gahagans.

described the places to be searched. J.A. at 256-62; Tr. at 193-99. Vetter and Boerema instructed the officers that the place to be searched was Cabin # 3 and House B as they later became known.

The search led to the discovery of approximately 840 grams of marijuana and 311 grams of hashish. The search resulted in the discovery of $4000 in U.S. currency, including $700 in marked bills from the controlled buy which had been made earlier on September 12, 1986. Other items discovered as a result of the search included cocaine paraphernalia, a hand scale, a black and brown ledger book, a "dial-a-gram" scale, a forty-five pound capacity triple beam scale, and two calculators. A number of weapons also were discovered, including a loaded .22 caliber semi-automatic pistol, a loaded .44 caliber magnum revolver, a loaded .357 caliber six shot revolver, a loaded .20 gauge pump shotgun, and a .22 caliber six shot revolver. The bulk of the narcotics discovered were found in Cabin # 3 and the remaining narcotics and other items were found generally in House B. J.A. at 73-85.

The motion to suppress the evidence was based upon the claim that the warrant failed to particularly describe the place to be searched. Specifically, the appellants asserted that the address of "7609 Douglas Lake Road" alone, was insufficient to include Cabin # 3.[2] The appellants maintained that cabin # 3 is a separate residence with its own address of 7577 Douglas Lake Road. The appellants did not raise the claim that the probable cause

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[2] The appellants assert that if the search of Cabin # 3 was constitutionally deficient then all of the fruits of the search are also bad including the search of House B.

determination by the state court judge was deficient, but instead focused their arguments on the particularity requirement, and in the alternative, the argument that assuming the warrant was valid, the officers exceeded the scope of the warrant in their search.

The circumstances surrounding the search are complicated by the nature of the location searched and require a detailed explanation. A better understanding of the circumstances and facts surrounding the search may be gained by a reference to Appendix I.[3]

The district court conducted a two-day evidentiary hearing on the motions. During the hearing, a detailed description of the physical lay-out of the area searched was developed. The general area at issue in this case is a rural, large piece of property with multiple dwellings and structures. It was developed at the hearing, that there were four separate dwellings located in the general area.

With reference to Appendix I, the dwelling identified as "Cabin 3" was the principal residence of the defendant Daniel Gahagan at the time of the search.[4] Cabin # 3's address is 7577 Douglas Lake Road. Cabin # 3 is a single story wood, cabin-type home. The defendants Michael Gahagan and Susan Soper resided in "House B." The

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[3] Appendix I is the Court's reconstruction of the chalkboard exhibit used by the district court and counsel at the evidentiary hearing and supplied to this Court via a copy of a photograph of the chalkboard and the markings thereon. J.A. at 118.

[4] The numbers and letters used to identify the dwellings are derived from the terms used by the parties during the evidentiary hearing.

address for House B is 7609 Douglas Lake Road. House B is a multi-story wood frame house with an unattached garage that was partially completed and under construction since 1981. Daniel Gahagan was a co-owner of House B. When the search warrant was executed, the three appellants were found in Cabin # 3.

A cabin identified as # 2 and the house identified as # 4 were not owned or occupied by any of the appellants at the time of the search. However, prior to May of 1986, Daniel Gahagan owned House # 4 and it was in this house that the first three controlled buys took place. In May of 1986 he sold the property to a third party. House # 4 is a multi-story wood frame house with a two-car unattached garage. The address for House # 4 is 7539 Douglas Lake Road. Cabin # 2 is a single story wood, cabin-type house located approximately one hundred yards north of House # 4.

Driveway # 1 was identified as a driveway that serviced House B, 7609 Douglas Lake Road. There was a dispute over whether Driveway # 1 extended through the foliage to Cabin # 3. The Gahagans claim that there was "a path" that extended along Driveway # 1 past House B to Cabin # 3. However, there was testimony from Agent Vetter, Detective Boerema, and a bulldozer operator who had done work for the Gahagans, that the actual driveway extended to Cabin # 3. Agent Vetter testified that he drove a full-size Bronco on the day of the search between House B and Cabin # 3 without using the four-wheel drive capability.

At one time, Driveway # 2 serviced House # 4 and branched off and also serviced Cabin # 3. When House #

4 was sold in 1986, it was agreed by Daniel Gahagan and the buyer that Driveway # 2 would no longer service Cabin # 3. A new driveway, Driveway # 3, was constructed to provide access to Cabin # 3. Driveway # 3, however, did not exist for the majority of the time the defendants were under investigation but was installed in August, 1986.

At the end of Driveway # 1, the address of 7609 Douglas Lake Road was posted on a sign. The address of 7577, Cabin # 3, was posted at the end of Driveway # 2. J.A. at 300; Tr. at 244. The address of 7539, House # 4, was also posted at the end of Driveway # 2. There was no address posted at the end of Driveway # 3. There were no address markings on either House B or Cabin # 3.

At the time that Gahagan owned House # 4 a mailbox was at the end of Driveway # 2 and mail for House # 4, Cabin # 3, and House B were all received at that mailbox. After the sale of House # 4, the mailbox was moved to the end of Driveway # 1 and mail was received at that mailbox for both Cabin # 3 and House B. There was no mailbox at the end of Driveway # 3.

The appellants' particularity argument was based primarily on the fact that the address of 7609 Douglas Lake Road alone was insufficient to include Cabin # 3 which had its own address of 7577 given the officers' knowledge that the defendants had lived in at least three of the dwellings identified and that there were transactions that occurred in more than one house. Furthermore, the appellants argued that the affidavit which was relied upon by the judge could not be looked to for a further description of the property to be searched because the

affidavit was neither attached nor specifically incorporated in the warrant.

The appellants also argued to the district court that the officers exceeded the scope of the warrant when they executed the warrant. They argued that the officers should have concluded that they were outside the scope of the warrant when they arrived at House B and discovered more than one dwelling. They argued that a reasonable pre-search investigation would have revealed the fact that Cabin # 3 was a separate residence apart from House B. The appellants cited the district court to *Maryland v. Garrison*, 480 U.S. 79, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987). The appellants attempted to underscore Daniel Gahagan's testimony that when he read the warrant after he was served with it, he told the executing officers that they had the wrong address for a search of Cabin # 3.

The trial judge ruled from the bench and denied the motions to suppress the evidence. Initially, the district court found that "the warrant does not, on its face, without cross reference, include number three." J.A. at 370; Tr. at 348. The district court found that the warrant cross referenced the affidavit notwithstanding the fact that the affidavit was not attached to the warrant. J.A. at 370, 372; Tr. at 348, 350. The trial judge stated that

> The only thing the staple would do would be to inform the Defendant of the scope of the search. It wouldn't have changed, absolutely, anything with respect to the officers, because these officers knew with absolute certainty that they were being authorized by the judge to search number three and B. There wasn't any question they understood it through cross reference to the affidavit.

J.A. at 370; Tr. at 348. The trial court concluded that the officers had acted in good faith in the execution of the warrant believing that they had been issued a warrant to search the premises of House B and Cabin # 3. Further, the trial judge was satisfied that the issuing judge authorized the search for the two units.

The district court ultimately denied the motion to suppress based upon *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). J.A. at 374; Tr. at 352. The district court stated:

> [N]ot because of perfection here, not because 7609 on the face of the warrant describes it, not because of incorporation by reference – because I'm impressed with the idea one of the purposes of having it on the face of the warrant requires the incorporation by reference to have it attached to it is to inform the Defendant – but simply because I believe that the officers, while there was some negligence involved, hindsight is much easier than foresight, and while there was some carelessness involved in the way the matter was handled, while they might have used the staple gun, I find that they were in good faith when they went out there.
>
> They believed they had given the Court information, and the Court had authorized them to include these two premises, and there was nothing there.
>
> While 7609 didn't include number three, I don't see anything on the premises to tell them it didn't. There was no sign outside the road to number three, the new road, no different number, nothing to inform them it didn't.
>
> And if there was, there would be an argument that affected their good faith.
>
> I don't reject the possibility there [sic] may have gotten concerned and decide to get another warrant,

then for some reasons or another, backed off on their intentions. I don't need to ever know whether that occurred or not.

So the motion to suppress is denied based on Leon.

J.A. at 373-74; Tr. at 351-52.

IV. DISCUSSION/ANALYSIS.

Appellant Daniel Gahagan articulates the four major issues on appeal: (1) whether the trial court erred in denying defendants' motion to suppress evidence on the basis that the warrant failed to describe the properties to be searched with sufficient particularity under the fourth amendment; (2) assuming the validity of the warrant, whether the execution of the warrant exceeded its scope in violation of the fourth amendment; (3) whether the *Leon* good-faith exception to the warrant requirement is applicable to this case; and (4) whether it was error for the trial court to deny defendant's motion in limine as it related to firearms and ammunition. Appellant Michael Gahagan joins in the first three issues presented by the appellant Daniel Gahagan and specifically addresses the fourth issue in his brief.

The appellant Soper separately addresses the issue of whether the trial court erred in denying her motion for a severance and joins in the issues raised by the Gahagans.

At the outset, we find it necessary to frame the scope of our inquiry. The appellants claim that because the search of Cabin # 3 was constitutionally inadequate the entire search was reduced to a general search, and therefore all the evidence seized from both Cabin # 3 and House B should be suppressed. We find, however, that

even if we should find an unlawful search of Cabin # 3, that alone does not invalidate the entire search and the evidence seized as a result of the search. It is clear that the warrant sufficiently describes House B and the appellants do not raise any specific claims as to the search of House B. An "[u]nlawful seizure of items outside a warrant does not alone render the whole search invalid and require suppression of all evidence seized, including that lawfully taken pursuant to the warrant." *United States v. Lambert*, 771 F.2d 83, 93 (6th Cir.1985) (citing *Marvin v. United States*, 732 F.2d 669, 674 (8th Cir.1984); *United States v. Tamura*, 694 F.2d 591, 597 (9th Cir.1982)). Consequently, our focus is limited to the evidence seized as a result of the search of Cabin # 3 only.

A. *Particularity of the Warrant.*

The appellants argue, on appeal, that the warrant failed to comply with the particularity requirement of the fourth amendment because the warrant itself does not authorize the search of Cabin # 3, and the defect in the warrant cannot be cured by a reliance on the affidavit because the affidavit was not specifically incorporated in the warrant and it was not attached to the warrant. The government takes the position that although the district court found that the warrant did not specifically include Cabin # 3, the trial judge determined that the officers were entitled to the good-faith exception under *Leon*.

In our view, the resolution of the appellants' first claim turns upon the following questions: (1) whether the warrant itself described the place to be searched with sufficient particularity; (2) if the warrant failed to

describe the place to be searched with sufficient particularity, whether the affidavit's description of the property to be searched cured the defect in the warrant; and (3) if the affidavit cannot cure the warrant, does the good-faith exception of *Leon* apply.

The standard of review for this Court in determining whether a search warrant describes the place to be searched with sufficient particularity is a *de novo* review. *United States v. Fannin*, 817 F.2d 1379, 1381 (9th Cir.1987); *United States v. McClintock*, 748 F.2d 1278 (9th Cir.1984).

The test for determining whether the description in the warrant is sufficient to satisfy the particularity requirement is whether "the description is such that the officers with a search warrant can with reasonable effort ascertain and identify the place intended." *Steele v. United States*, 267 U.S. 498, 503, 45 S.Ct. 414, 416, 69 L.Ed. 757 (1925); *United States v. Votteller*, 544 F.2d 1355, 1362 (6th Cir.1976). As this Court held in *United States v. Lemmons*, 527 F.2d 662, 666 (6th Cir.), *cert. denied*, 429 U.S. 817, 97 S.Ct. 60, 50 L.Ed.2d 77 (1976), "the Fourth Amendment 'safeguard is designed to require a description which particularly points to a definitely ascertainable place so as to exclude all others.' " (quoting *People v. Watson*, 26 Ill.2d.203, 186 N.E.2d 326 (1962). In sum, "[t]he test for determining the sufficiency of the description of the place to be searched is whether the place to be searched is described with sufficient particularity as to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premises might be mistakenly searched." *United States v. Gitcho*, 601 F.2d 369, 371 (8th Cir.), *cert. denied*, 444 U.S. 871, 100 S.Ct. 148, 62 L.Ed.2d 96

(1979). *See United States v. Collins*, 830 F.2d 145, 146 (9th Cir.1987); *United States v. Prout*, 526 F.2d 380, 387-88 (5th Cir.), *cert. denied*, 429 U.S. 840, 97 S.Ct. 114, 50 L.Ed.2d 109 (1976). Therefore, the test can be divided into two components: (1) whether the place to be searched is described with sufficient particularity as to enable the executing officers to locate and identify the premises with reasonable effort; and (2) whether there is reasonable probability that some other premises may be mistakenly searched. *See, United States v. Turner*, 770 F.2d 1508, 1509 (9th Cir.1985).

It is clear that the warrant itself did not contain a sufficient description of Cabin # 3, 7577 Douglas Lake Road. The description in the warrant identified only the address of 7609 Douglas Lake Road, while in fact Cabin # 3 was not a part of that address. The trial judge specifically found that the description in the warrant did not include Cabin # 3. J.A. at 370; Tr. at 348.

However, we find that the description contained in the affidavit sufficiently described the place to be searched and that description included Cabin # 3. The description in the affidavit sufficiently described both House B and Cabin # 3 so that the executing officers could reasonably ascertain the premises to be searched. Moreover, we find that the affidavit can be relied upon, in addition to other facts known by the executing officers, to cure the defect in the affidavit.

A warrant that fails to describe the area to be searched with sufficient particularity can be cured by an accompanying affidavit if the affidavit is attached to the warrant and the warrant incorporates the affidavit by

reference. *See, United States v. Klein*, 565 F.2d 183, 186 n. 3 (1st Cir.1977) ("An affidavit may be referred to for purposes of providing particularity if the affidavit accompanies the warrant, *and* the warrant uses suitable words of reference which incorporates the affidavit." *Id.* (citation omitted) (emphasis in original)); *United States v. Weinstein*, 762 F.2d 1522, 1531 (11th Cir.1985) ("Clearly, an affidavit incorporated into a warrant by express reference attached to an accompanying a warrant can cure ambiguity in the warrant itself." *Id.* (citations omitted)); *see also United States v. Leary*, 846 F.2d 592, 603 (10th Cir.1988); *United States v. Fannin*, 817 F.2d 1379 (9th Cir.1987).

We recognize that it was established at the evidentiary hearing that the affidavit itself was not attached to the warrant. However, Vetter testifies that the affidavit was in his vehicle and readily accessible to the officers. At least one commentator has concluded that if the description contained in the warrant itself is inadequate, "it is appropriate to look to the description appearing in the warrant application or affidavit *if* it is clear that the executing officers were in a position to be aided by the document. . . ." 2 W. LaFave, *Search and Seizure* § 4.5(a), p. 209 (2d ed. 1987) (emphasis in original).

It was not disputed that the warrant itself did not specifically incorporate the affidavit. However, the trial judge found that the warrant cross-referenced the affidavit. Moreover, the affidavit supplied with the warrant specifically incorporated the multi-page affidavit prepared buy Vetter.

We also find that other courts have taken into account facts known by the executing officer but not specifically stated in the affidavit or warrant to validate a search. For example, in *United States v. Burke*, 784 F.2d 1090 (11th Cir.), *cert. denied*, 476 U.S. 1174, 106 S.Ct. 2901, 90 L.Ed.2d 987 (1986), the Eleventh Circuit Court of Appeals upheld a search of an apartment despite the presence of an incorrect address in the warrant. The court relied on the fact that the affiant was on the scene and pointed out the house to be searched when an error was discovered in the address. *Burke*, 784 F.2d at 1093.

In *United States v. Turner*, 770 F.2d 1508 (9th Cir.1985), *cert. denied*, 475 U.S. 1026, 106 S.Ct. 1224, 89 L.Ed.2d 334 (1986), the circuit court upheld the search of a home that was sufficiently described except for the street number. The court found that the warrant description was sufficiently particular on the basis that

> [t]he verbal description contained in the warrant described the house to be searched with great particularity; no nearby house met the warrant's detailed description; the address in the warrant was reasonable for the location intended; the house had been under surveillance before the warrant was sought; the warrant was executed by an officer who had participated in applying for the warrant and who personally knew which premises were intended to be searched; and the premises that were intended to be searched were those actually searched.

Turner, 770 F.2d at 1511. The court concluded given those circumstances, "there was virtually no chance that the executing officer would have any trouble locating and identifying the premises to be searched, or that he would mistakenly search another house." *Id.*

In *United States v. Clement*, 747 F.2d 460 (8th Cir.1984), police officers executed a search warrant at the residence of Clement. The warrant described the premises to be searched by Clement's name and street address, and also identified it as apartment four. However, the officers searched an apartment identified as number three. Clement had previously lived in apartment number four and was residing in apartment number three when the warrant was issued. The circuit court upheld the search and stressed that the officer had been to the residence sought to be searched many times before and actually knew where the named occupant lived and went directly to his apartment in executing the warrant. *Clement*, 747 F.2d at 461. The court stated that "there is no probability of a mistaken search and we cannot conclude that the inaccurate address in the warrant should operate to invalidate the search." *Id.*

In *United States v. Gitcho*, 601 F.2d 369 (8th Cir.1979), *cert. denied*, 444 U.S. 871, 100 S.Ct. 148, 62 L.Ed.2d 96 (1979), the warrant described the premises to be searched as "4144 Geraldine, Apt. # 7, Parc Chalet Apartments, St. Louis County, Mo." However, the executing agents found no such numbered building, but rather searched the premises known as 4146 Parc Chalet, Apartment 7, St. Louis County, Mo. which was under constant surveillance before and during the warrant acquisition. The district court suppressed the evidence seized notwithstanding a finding by the district court that the officers executing the warrant had personal knowledge of the premise to be searched. On appeal, the Eighth Circuit Court of Appeals reversed and upheld the search.

The circuit court recognized that while the address was technically incorrect there were additional circumstances which supported a finding that the search was valid. First, the circuit court concluded that because the address stated in the warrant did not exist in fact there was no possibility that a mistaken search of the wrong premises was possible. *Gitcho*, 601 F.2d at 372. Second, the circuit court placed significant importance on "the fact that the agents executing the warrant personally knew which premises were intended to be searched. . . ." *Id.* Moreover, "[t]he premises which were intended to be searched were, in fact, those actually searched." *Id.*

Against the backdrop of the cited case law, we find that the description of the property to be searched contained in the affidavit, as well as the relevant information known by the executing officers in this case, can be relied upon to validate a warrant if the description contained in the warrant itself is less than complete. Here, there is no dispute that probable cause existed to search 7609 Douglas Lake Road, the place listed in the warrant. Further, there is no dispute that the officers knew that the search was for Cabin # 3 and House B. The officers supplied the court with the description contained in the affidavit and therefore could reasonably ascertain both Cabin # 3 and House B.

Further, there was no risk here that a mistaken search of another premises was possible given the officers knowledge of the facts surrounding the nine month investigation. The officers knew that the Gahagans, for example, sold House # 4 at an earlier time and consequently did not intend to search that house nor did they search the house! Further reducing the risk of an

unauthorized search of another house is the fact that there were no other residents in the area except House B and Cabin # 3. Therefore, there was no possibility of a mistaken search of another premises.

Consequently, we find that when one of the executing officers is the affiant who describes the property to the judge, and the judge finds probable cause to search the property as described by the affiant, and the search is confined to the areas which the affiant described, then the search, in this case, is in compliance with the fourth amendment.

Having determined that the affidavit described Cabin # 3 with sufficient particularity, we find it unnecessary to determine whether the good faith exception of *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), is applicable.

B. *Whether the Execution of the Warrant Exceeded its Scope in Violation of the Fourth Amendment.*

Because we conclude that the description in the affidavit sufficiently described Cabin # 3, we find it unnecessary to consider appellant's claim that the execution of the warrant exceeded its scope.

C. *Motion to Suppress the Guns and Ammunition.*

The appellants argue that there was error to deny their motion in limine as to the firearms and ammunition found during the search. The appellants' argument that the evidence of the firearms should have been suppressed is based upon Federal Rule of Evidence 403.

The appellants argue that the introduction of the seized firearms have limited relevance and would unduly prejudice the rights of the defendants. The appellants argue that possession of the firearms is not one of the counts contained in the indictment and that mere possession of them would unduly prejudice the defendants.

The government, on the other hand, argues that the Sixth Circuit has recognized that firearms and ammunition are tools of the drug trafficking trade and have been received as evidence in drug distribution cases. *See, United States v. Arnott*, 704 F.2d 322, 325-26 (6th Cir.), *cert. denied*, 464 U.S. 948, 104 S.Ct. 364, 78 L.Ed.2d 325 (1983); *United States v. Marino*, 658 F.2d 1120, 1122-24 (6th Cir.1981).

At the hearing the district court weighed the question of prejudice and concluded that no such prejudice existed for mere possession of firearms in an area of Michigan where firearms were very prevalent. J.A. at 383; Tr. at 366.

We find that the appellants have failed to establish that the decision of the judge regarding the prejudicial effect of the weapons was a clear abuse of discretion. Accordingly, we affirm the district court's holding on the motion to suppress the firearms and ammunition.

D. *Motion for Severance.*

The appellant Soper argues that the failure of the trial court to sever her trial with that of her co-defendants effectively precluded her from presenting the testimony

of Michael and Daniel Gahagan in view of their constitutional protection.

The government asserts that the district court correctly found that the defendant Soper failed to make the requisite showing that would justify granting her motion for severance. Furthermore, the government asserts that there was no guarantee that the defendants Gahagan would testify on her behalf should there be a second trial. Moreover, the government asserts that the district court found that there was no guarantee that defendant Soper would be tried second.

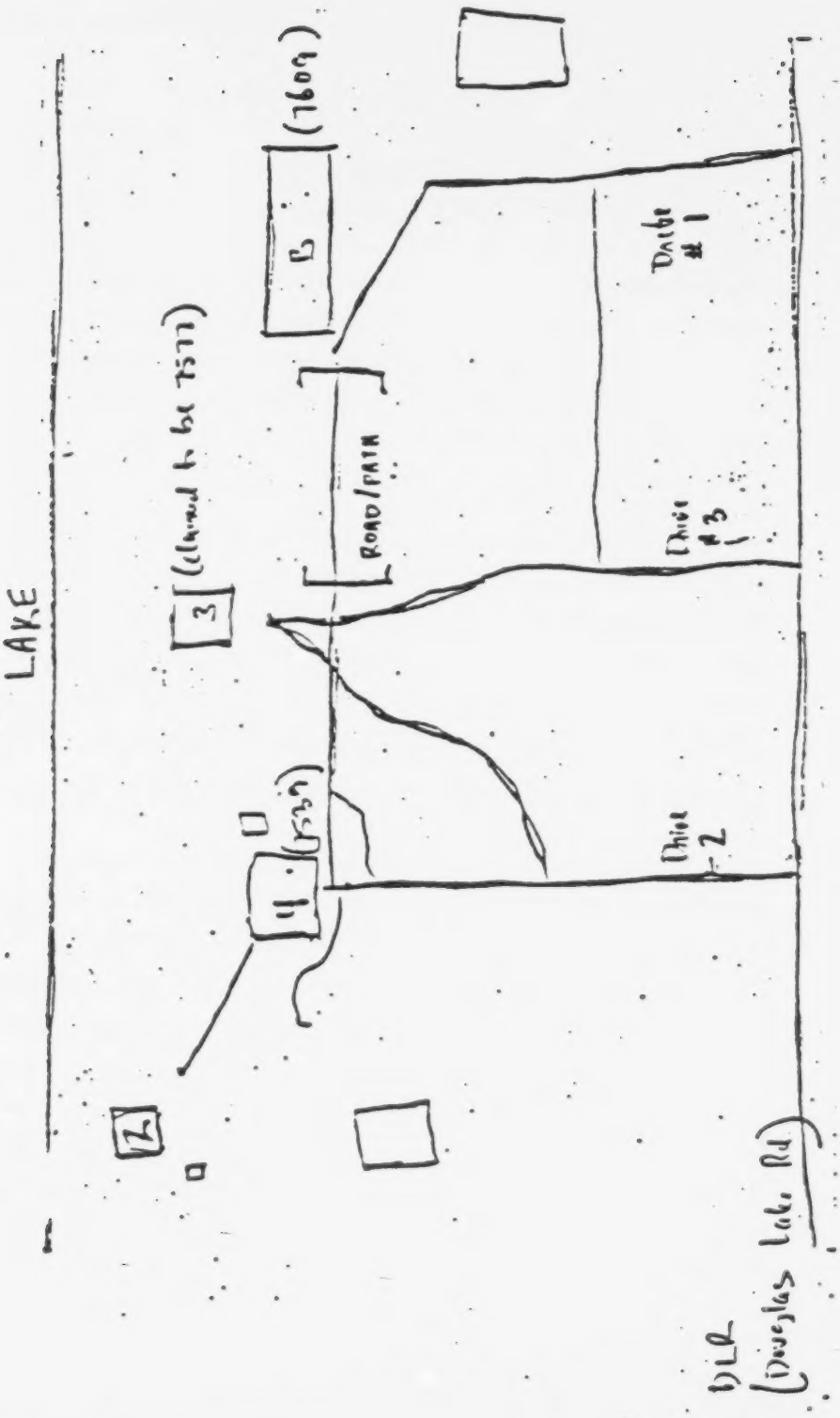
The district court weighed the factors in the motion for severance and denied the motion based upon the fact that there was no guarantee that there would be a second trial or that the Gahagans would testify during that trial. Furthermore, the district court recognized that the evidence offered by the government against the Gahagans would be offered in defendant Soper's trial.

We affirm the district court's denial of the motion to sever.

V. CONCLUSION.

For the reasons stated above, we affirm the district court's decision in its entirety.

APPENDIX I


LAKE
3
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(160')
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Dwlg #1
Dwlg #3
Dwlg #2
4
(75')
2
DLR
(Douglas Lake Rd)

NO. 87-1991

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee	:	
vs.	:	O R D E R
DANIEL SCOTT GAHAGAN, Defendant-Appellant	:	(Filed March 3, 1989)

This matter is before the court upon consideration of the appellant's petition for rehearing of the court's opinion of January 25, 1989 affirming the decision of the district court.

Having further reviewed the petition, the panel concludes that issues raised in the petition were fully considered upon the original submission and decision of the case.

Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

/s/ Leonard Green

Supreme Court, U.S.
FILED
JUN 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1611

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1988

DANIEL SCOTT GAHAGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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10 pp

QUESTION PRESENTED

Whether the search of petitioner's premises exceeded the scope of the search warrant.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Illinois v. *Gates*, 462 U.S. 213 (1983)	4-5
Maryland v. *Garrison*, 480 U.S. 79 (1987)	6
Steele v. *United States*, 267 U.S. 498 (1925)	5
United States v. *Leon*, 468 U.S. 897 (1984)	4

Constitution, statute and rule:

U.S. Const. Amend. IV	5, 6
21 U.S.C. 841(a)(1)	2
Fed. R. Crim. P. 11(a)(2)	1

Miscellaneous:

2 W. LaFave, *Search and Seizure* (2d ed. 1987)	5

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1611

DANIEL SCOTT GAHAGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 865 F.2d 1490.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1989. A petition for rehearing was denied on March 3, 1989 (Pet. App. 25a). The petition for a writ of certiorari was filed on April 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea pursuant to Fed. R. Crim. P. 11(a)(2), petitioner was convicted on one count

of possession of hashish with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to two years' imprisonment, followed by a two-year special parole term. The court of appeals affirmed (Pet. App. 1a-24a).

1. On September 12, 1986, Michael Vetter, an agent of the Drug Enforcement Administration, obtained a warrant to search petitioner's premises at 7609 Douglas Lake Road, Johannesburg, Michigan. In the accompanying affidavit, Agent Vetter described the premises as follows:

> 7609 Douglas Lake Road, Charleton Township, Otsego County, Johannesburg, Michigan, three story wood frame house with natural wood siding with an unattached four-car garage with natural color siding. Also located on the property is a single story wood frame log cabin-type structure painted dark brown in color. Also located on the property is a small wood frame shed-type building with a metal roof.

The affidavit also set out the probable cause to believe that narcotics and related paraphernalia would be found on the premises. It stated that a confidential informant had purchased marijuana on three occasions at the property known as 7609 Douglas Lake Road, and that the transactions often took place at a one-story wood frame cabin on the premises. Moreover, according to the informant, petitioner and his confederates kept their narcotics in different locations on the premises. Finally, the affidavit recounted a controlled purchase of narcotics from petitioner, conducted on the premises and under the surveillance of Agent Vetter on September 12, 1986. Pet. App. 4a-5a & n.1.

Acting pursuant to the warrant, federal agents searched two buildings—"House B" and "Cabin #3."[1] From Cabin #3 the agents seized a quantity of marijuana and hashish, and from House B they seized currency (including $700 in marked bills from the September 12 controlled buy), weapons, a ledger, a triple beam scale, and a quantity of narcotics. Pet. App. 6a-7a.

2. Petitioner moved to suppress the evidence. He asserted that Cabin #3 is a separate residence with its own address of 7577 Douglas Lake Road. Petitioner contended that in searching Cabin #3 the agents had exceeded the scope of the warrant, which authorized only the search of the premises at 7609 Douglas Lake Road.

At the hearing on the motion, the prosecutor elicited testimony that the driveway that serviced House B extended as well to Cabin #3, and that a separate driveway for Cabin #3 was not constructed until the investigation of petitioner and his confederates was well underway. Moreover, the evidence showed that whereas the address for House B, 7609 Douglas Lake Road, was posted at the end of the nearby driveway, the address for Cabin #3, 7577 Douglas Lake Road, was posted only at the entrance to a separate driveway that serviced a different house and that no longer serviced Cabin #3. In addition, the prosecutor established that there were no address markings on either House B or Cabin #3; that during much of the investigation there was a single mailbox for both House B and Cabin #3 located at the end of the driveway that serviced House B; and that there was no mailbox at the end of the separate driveway that was constructed to service

[1] The designations are taken from the diagram attached by the court of appeals at the conclusion of its opinion (see Pet. App. 24a).

Cabin #3. Finally, the testimony showed that House B was under construction and only partially completed at the time of the investigation. Pet. App. 7a-10a.

The trial court denied the motion to suppress, concluding that the agents had acted in good faith under this Court's decision in *United States* v. *Leon*, 468 U.S. 897 (1984). The court explained that the agents "believed * * * the Court had authorized them to include the[] two premises." It also noted that there was no indication on the premises that Cabin #3 had an address different from House B. Pet. App. 12a.

3. The court of appeals affirmed (Pet. App. 1a-24a), holding that the search of Cabin #3 was lawful. The court agreed with petitioner that the warrant did not sufficiently describe the cabin. It held, however, that the description in the accompanying affidavit was sufficient, and that the affidavit, together with certain facts about the premises known by the agents, could be relied upon to provide sufficient particularity (*id.* at 16a-21a).[2]

ARGUMENT

Petitioner contends (Pet. 8-16) that Agent Vetter's affidavit could not be used "to cure [the] lack of particularity" in the warrant to search his premises (Pet. 10). That issue, however, is not presented in this case because, in the factual context of the case, the search warrant itself was sufficiently particular to justify the search of Cabin #3.

As a general matter, search warrants must be read in a common sense fashion. See *Illinois* v. *Gates*, 462 U.S. 213,

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[2] The court of appeals also rejected (Pet. App. 21a-22a) the contention that the trial court should not have admitted into evidence the firearms and ammunition seized during the search. The petition does not present that issue.

235-236 (1983). Moreover, in determining whether the identification of the place to be searched satisfies the Fourth Amendment's command of specificity, "[i]t is enough if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended" (*Steele v. United States*, 267 U.S. 498, 503 (1925)). As one commentator has noted, "the primary purpose of this limitation is to minimize the risk that officers executing search warrants will by mistake search a place other than the place intended by the magistrate" (2 W. LaFave, *Search and Seizure* § 4.5, at 207 (2d ed. 1987)).

In the present case, there is no doubt that the agents searched exactly the premises "intended by the magistrate" (2 W. LaFave, *supra*, § 4.5, at 207)—which included Cabin #3. The affidavit expressly stated that petitioner and his confederates had kept their narcotics "in different locations upon and about the property located at 7609 Douglas Lake Road" (Pet. App. 5a n.1). Plainly, the agents and the magistrate understood that there was more than one building on the premises. Indeed, the affidavit made clear that among the "locations" on the premises was "a one-story wood frame cabin" and that some of the narcotics transactions had taken place there (*ibid.*). That "wood frame cabin" was Cabin #3.

Moreover, it was not unreasonable for the agents and the magistrate to believe that Cabin #3 was part of 7609 Douglas Lake Road, along with House B. The cabin shared a common driveway with House B; it shared a common mailbox with House B; and the cabin bore no indication that it had a different address from House B. What is more, House B was under construction and only partially completed at the time of the investigation. It was therefore reasonable for the agents and magistrate to assume that

the fully renovated cabin was part of the same premises as House B.

To be sure, Cabin #3 turned out to have a separate address from House B. But this Court has "recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants" (*Maryland* v. *Garrison*, 480 U.S. 79, 87 (1987)). In the *Garrison* case, for example, police officers, executing a warrant to search the "third floor apartment" in a particular building, discovered during the search that there were two separate apartments on that floor. This Court held that even if the warrant did not extend to the respondent's apartment in particular, the search was nonetheless lawful under the Fourth Amendment. The Court explained that "the validity of the search of respondent's apartment * * * depends on whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable" (*id.* at 88). Applying that standard, the Court found that "[t]he objective facts available to the officers at the time suggested no distinction between [the two apartments]" (*ibid.*). The Court therefore concluded that "the officers' conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment" (*id.* at 88-89).

The same principles apply to this case. Here, as well, the agents believed—and had every reason to believe—that both Cabin #3 and House B were part of 7609 Douglas Lake Road. As in *Garrison*, "[t]he objective facts available to the officers at the time suggested no distinction between" the two buildings (480 U.S. at 88). "With the benefit of hindsight" (*Garrison*, 480 U.S. at 85), of course, it is now clear that the cabin had its own address. But "judg[ing] the constitutionality of [the agents'] conduct in

light of the information available to them at the time they acted" (*ibid.*), the search in this case was entirely reasonable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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